ARISTOTLE ON LEGAL REDRESS.

In the course of my studies in ancient jurisprudence I was led to examine somewhat closely the interesting chapters devoted to the subject by Aristotle in Book V of the Nicomachean Ethics. I soon found that, although the passages in question had been the occasion of much ingenious interpretation on the part of editors and commentators, it was not altogether easy to find a thread which would lead one through the intricacies and pitfalls of the text. I should like to state some considerations which occurred to me in connection with the doctrine of so-called corrective justice, or legal redress: it is a matter which concerns jurists as well as philologists and philosophers.

I need not remind my readers of the fact that Aristotle's doctrine as to distributive and corrective justice (*τὸ διανεμητικόν* and *τὸ διορθωτικὸν δίκαιον*) has achieved great fame and played a most conspicuous part in the history of legal ideas. It may be sufficient to mention as an example of its far-reaching influence that it gave rise to important speculations of Grotius, who declined to measure distributive functions of Society by the standard of justice and restricted the application of the latter in a way characteristic of modern times to the reparation of infringed rights.[1]

I use the expressions "reparation of infringed rights," "redress of grievances," "legal redress," because it is clear from the whole exposition of Aristotle that in the case of what he calls "particular justice" (*ἡ ἐν τῷ μέρει δικαιοσύνη*) of which the *διορθωτικὸν δίκαιον* is one of the varieties, actual redress is meant and not merely a disposition or frame of mind suggesting reparation. The legal would in this case strictly correspond to the just, and the correspondence of *νόμιμον* and *δίκαιον* is mentioned in as many words in the introductory chapter of the treatise.[2] Although, therefore, for the purpose of translation the term *διορθωτικὸν δίκαιον* may be appropriately rendered as "corrective justice," we are justified, I think, in *interpreting* it as "legal redress in accordance with justice." The advantage of

[1] Grotius, De jure belli ac pacis: Lib. 1, c. 1, § 8, de justitia expletrice et attributrice.

[2] Ethica Nicomachea, V, 1, 8, p. 1129 a, l. 34: *τὸ μὲν δίκαιον ἄρα τὸ νόμιμον καὶ τὸ ἴσον, τὸ δ' ἄδικον τὸ παράνομον καὶ τὸ ἄνισον.* Cf. § 12.

such an interpretation would be that it would place before us, instead of a very peculiar term, a designation common to different systems of law, and forming, as a matter of fact, the logical consequence of disturbed rights. *Legal redress* is one of the aspects of justice wherever it makes its appearance, but in various countries there will, of course, be material differences as to how far such redress has to stretch, what its delimitation from rules as to the distribution of rights or as to the action of the Commonwealth in propagating morality and public welfare ought to be. In any case it may not be useless to be reminded that we tread on ground occupied by jurisprudence and have to consider, not all kinds of possible interpretations, but those which fit best into recognized juridical distinctions.

Before proceeding to analyze the particulars of the Aristotelian teaching on legal redress, let us cast a glance at the *general arrangement* of the subjects with which our philosopher was dealing. It is easy to see that the teaching as to justice is subdivided into four sections. There is, to begin with, justice in general or justice universal (ἡ καθόλου δικαιοσύνη). There are, secondly and thirdly, the two species of justice in particular (ἐν μέρει), and there is, fourthly, fairness in voluntary exchanges, which does not amount to a special kind of justice,[3] but rather falls into the domain of fair economic intercourse. With the last section we need hardly concern ourselves except insomuch as it may serve to throw into relief some of the peculiarities of the third section. The second section or the first subdivision of the second genus, namely *distributive* justice, again, deals with the necessity for a community, not only to safeguard rights, but to allow and distribute them according to considerations of justice.[4] In regard to the first and third sections there seems to have been some misapprehension. The former has been sometimes understood as referring merely to justice as complete virtue, as a moral force outside concrete application in the courts,[5] while in the latter, investigators have often sought an answer to all questions bound up with the restoration of legal order. To use the words of Grant—

[3] Cf. in a different sense, Ritchie, Classical Review, VIII. pp. 185 ff.

[4] It may be also taken to mean justice in the actual distribution of goods or land by the State (*e. g.* Ἀθηναίων Πολιτεία, c. 21). But it is not my intention to go further into a discussion of this point in the present paper.

[5] *E. g.* E. Barker, The Political Thought of Plato and Aristotle, p. 322.

"The term corrective justice is in itself an unfortunate one, because it appears to lay down principles for restitution and therefore implies wrong. Thus it has a tendency to confine the view to involuntary transactions instead of stating what must be the principle of the just in all the dealings between man and man." [6]

On the other hand, an eminent Oxford commentator points out that

"even when an ordinary citizen injures another ordinary citizen, the true nature of the situation created is misrepresented by the term *συνάλλαγμα* (transaction) applied to it. We are not merely concerned with a relation between two individuals *in vacuo,* but with a sore in the body politic which must be healed by means which take into account the whole organism. *Διόρθωσις* is much more than making the *ἀδικῶν* give compensation to the *ἀδικούμενος*,—indeed it is sometimes impossible to compensate him at all." [7]

Now, I submit that the deliberate choice of the terms *διόρθωσις* and *συνάλλαγμα* is neither the product of casual and slovenly expression nor at variance with common-sense notions of justice, but rather characteristic of the way in which Aristotle arranges his material. The reaction of the Commonwealth against prohibited and noxious acts of citizens is mainly comprised under the heading of justice *universal* (I Section). The latter is said expressly to be directed to the maintenance of moral and social order as understood by the political authorities in the State.[8] All kinds of virtue and all sorts of vice may be prohibited and made punishable by the authorities from this point of view.[9] Indeed even precepts not necessarily moral may be made obligatory and enforced because the State declares them to be laws: one may have to seek justice by taking part in the cult of Brasidas in order not to infringe the law of

[6] Sir Alexander Grant, The Ethics of Aristotle, Illustrated with Essays and Notes: *vide* 4th ed., vol. II, p. 112, note on Eth. V, 4, 1, 1131 b.

[7] J. A. Stewart, Notes on Nicomachean Ethics: note, p. 434 in 1892 edition, on V, 4, 3, 1132 a, 2.

[8] Nic. Eth., ed. Bywater, V, 1, 13, 1129b, 14: *οἱ δὲ νόμοι ἀγορεύουσι περὶ ἁπάντων, στοχαζόμενοι ἢ τοῦ κοινῇ συμφέροντος πᾶσιν ἢ τοῖς ἀρίστοις ἢ τοῖς κυρίοις [κατ' ἀρετὴν] ἢ κατ' ἄλλον τινὰ τρόπον τοιοῦτον. ὥστε ἕνα μὲν τρόπον δίκαια λέγομεν τὰ ποιητικὰ καὶ φυλακτικὰ εὐδαιμονίας καὶ τῶν μορίων αὐτῆς τῇ πολιτικῇ κοινωνίᾳ.*

[9] *Ibid.* 1129 b, 19: *Προστάττει δ' ὁ νόμος καὶ τὰ τοῦ ἀνδρείου ἔργα ποιεῖν, οἷον μὴ λείπειν τὴν τάξιν μηδὲ φεύγειν μηδὲ ῥιπτεῖν τὰ ὅπλα, καὶ τὰ τοῦ σώφρονος, οἷον μὴ μοιχεύειν μηδ' ὑβρίζειν, καὶ τὰ τοῦ πράου, οἷον μὴ τύπτειν μηδὲ κακηγορεῖν, ὁμοίως δὲ καὶ κατὰ τὰς ἄλλας ἀρετὰς καὶ μοχθηρίας τὰ μὲν κελεύων τὰ δ' ἀπαγορεύων.*

Amphipolis.[10] This is a sufficient basis for the public side in law, and, in particular, for its criminal element. Law appears very properly, from this point of view, as a body of rules laid down by the Sovereign for the maintenance of a certain moral and social order. All transgressions against these rules are unjust and call forth the action of justice in the courts or intervention of executive officers. This is important to note in so far as it relieves the pressure on the second subdivision of particular justice, on its so-called "corrective" kind, in regard to criminal acts.

By allowing for this meaning of the first section one comes to understand that the relations of the third group, labelled as relations of corrective justice, are considered mainly from the point of view of legal redress, that is—of a restitution of rights or compensation for infringed rights which cannot be restored. This manner of approaching questions arising from unrighteous actions of one member of the community in regard to another is attended by marked difficulties, but it is logically possible, and, as a matter of fact, it was clearly taken up by Aristotle himself and by the actual law of Greek States. Infringements of right producing detrimental consequences for private interests could be considered and were often considered primarily as "private wrongs": compensation and punishment were welded together in such cases and punishment itself mostly took the shape of an increased compensation. We shall have to point out that it was so in actual law, but first let us turn to the exposition of Aristotle.

He goes the length of explaining that the redress or correction he means may arise out of voluntary transactions and out of delicts or involuntary transactions (*ἀκουσία συναλλάγματα*).[11] There is no reason for supposing that he wanted to speak under the first heading of any adjustment of contracts, say of sales or of leases, according to standards of supposed justice. In so far as fairness is concerned, he treats of it in the fourth section, but there is no indication of any idea corresponding to that expressed in modern Land acts,[12] unless

[10] Nic. Eth., V, 7, 1, 1134 b, 23.

[11] Cf. Dareste, La Science du Droit en Grèce, Paris, 1893, pp. 208 and 209. Also Beauchet, Histoire du Droit privé de la Republique athénienne, Paris, 1897, vol. IV, pp. 10 and 11.

[12] Cf. Stewart, Notes on Nicomachean Ethics: note, p. 432, on V, 4, 1, 1131 b, 25.

we are inclined to discover an allusion to something of the kind in the obscure remark that goods in exchange ought to be estimated before the transaction, because otherwise such transactions may turn out to be in every respect to the advantage of one party.[13] I will not dwell, however, on the possible interpretation of this passage in the sense of a desire for a tariff of fair prices. Aristotle takes it for granted that, as matters actually stand, the laws leave citizens free to seek their profit in concluding voluntary transactions.[14]

The only side from which corrective justice has to deal with sales, leases, exchanges, mortgages, debts, etc., is the side of redress. Obligations undertaken and not carried out have to be enforced, obligations undertaken under abnormal conditions, say under compulsion or in consequence of fraud, have to be rescinded, obligations misinterpreted by one of the parties have to be rightly formulated. These are clearly the consequences which any jurist will draw from the statement of the philosopher that the first duty of corrective justice is to deal with voluntary transactions such as sales, leases, mortgages, debts, etc.[15] It has to be added, unfortunately, that Aristotle does not further concern himself with this group and does not mention any examples of legal redress in connection with voluntary transactions—*i. e.*, contracts. We are left free to suppose that the subject seemed so obvious and simple to him that he did not care to illustrate it by express references to examples.

The matter was different in regard to involuntary transactions—the obligations *ex delicto* forming the main subject of the second subdivision. The transaction itself arises in this case from an act which was not meant to create an obligation, but amounted to an invasion of the plaintiff's right by the defendant, either with bad intention (*dolo*) or through negligence (*culpa*). This is why it may be appropriately styled, in respect to its origin, an involuntary transaction. It contains a certain penal element in consequence of the invasion of established

[13] Nic. Eth., V, 5, 12, 1133 b, 1 *et seq.*: εἰς σχῆμα δ' ἀναλογίας οὐ δεῖ ἄγειν, ὅταν ἀλλάξωνται [εἰ δὲ μή, ἀμφοτέρας ἕξει τὰς ὑπεροχὰς τὸ ἕτερον ἄκρον], ἀλλ' ὅταν ἔχωσι τὰ αὑτῶν. οὕτως ἴσοι καὶ κοινωνοί, ὅτι αὕτη ἡ ἰσότης δύναται ἐπ αὐτῶν γίνεσθαι.

[14] Nic. Eth., V, 4, 13, 1132 b, 15: οἷον ἐν τῷ ὠνεῖσθαι καὶ πωλεῖν καὶ ἐν ὅσοις ἄλλοις ἄδειαν δέδωκεν ὁ νόμος.

[15] Nic. Eth., V, 2, 12, 1130 b, 30: τῆς δὲ κατὰ μέρος δικαιοσύνης καὶ τοῦ κατ' αὐτὴν δικαίου ἓν μέν ἐστιν εἶδος τὸ ἐν ταῖς διανομαῖς τιμῆς ἢ χρημάτων ἢ τῶν ἄλλων ὅσα μεριστὰ τοῖς κοινωνοῦσι τῆς πολιτείας (ἐν τούτοις γὰρ ἔστι καὶ ἄνισον ἔχειν καὶ ἴσον ἕτερον ἑτέρου), ἓν δὲ τὸ ἐν τοῖς συναλλάγμασι διορθωτικόν.

right, and the question of making this element fit into the scheme of redress aiming at the satisfaction of the claim of the aggrieved party will necessarily be a delicate one. Let us notice, however, that in Greek law, and not only in Aristotle's jurisprudential statement, the matter is usually treated as one of redress complicated by penalties. Casual homicide, adultery, theft (in cases when the procedure *in flagranti* could not be applied), wounding, beating, bad language, as well as damages to property, were disposed of chiefly by private actions (δίκαι κατὰ τινος), although in certain cases the way to a public prosecution (γραφή) remained open.[16] In the action for damages, for instance, δίκη βλάβης, differences in regard to the infliction of penalties arose in consequence of directly recognized criminal intention.[17] In actions arising out of battery, the ordinary form of procedure was the δίκη αἰκίας,[18] although it might be turned into a γραφή ὕβρεως, an accusation *injuriarum* of a public and criminal kind.[19]

It is not without significance that in the Roman law of the prætors the tendency to treat delicts and obligations arising out of delicts on the basis of private actions is also very noticeable. The ordinary action for damages based on *quanti interest* was, of course, applied in cases when material losses had been occasioned by the unlawful action of the defendant. But a similar procedure was followed in the case of an *actio injuriarum æstimatoria,* that is—in cases when a penal element was clearly perceivable. The action *ex lege Aquilia de damno injuria dato* resolved itself into an estimation of the moral and material injury inflicted on the plaintiff, and we find that even in such egregiously criminal cases as those of casual homicide, of wounding, of corruption of daughters and sons in the power

[16] Meier, Schömann, and Lipsius, Der Attische Process, I, 202, ff. Cf. J. Cook Wilson, in Transactions of the Oxford Philological Society, 1887-1888, pp. 2-4.

[17] Pauly-Wissowa, Real-Encyklopädie der Klassischen Altertumswissen schaft, *sub voce*, Demosthenes v. Meidias, §§ 52 ff.

[18] Pauly-Wissowa, *sub voce.*

[19] Demosthenes, Ariston v. Conon, 1256, I, 5: ἀπροσδοκήτως ἔλαχον αὐτῷ τὴν δίκην τῆς αἰκείας ταυτηνί. πάντων δὲ τῶν φίλων καὶ τῶν οἰκείων, οἷς συνεβουλευόμην, ἔνοχον μὲν φασκόντων αὐτὸν ἐκ τῶν πεπραγμένων εἶναι καὶ τῇ τῶν λωποδυτῶν ἀπαγωγῇ καὶ ταῖς τῆς ὕβρεως γραφαῖς, συμβουλευόντων δὲ μοι καὶ παραινούντων μὴ μείζω πράγματ' ἢ δυνήσομαι φέρειν ἐπάγεσθαι, μηδ' ὑπὲρ τὴν ἡλικίαν ὧν ἐπεπόνθειν ἐγκαλοῦντα φαίνεσθαι, οὕτως ἐποίησα καὶ δι' ἐκείνους ἰδίαν ἔλαχον δίκην, ἥδιστ' ἂν ὦ ἄνδρες Ἀθηναῖοι θανάτου κρίνας τοῦτον.

of a *paterfamilias,* the matter was treated as one of damage on the strength of an enlarged interpretation of the *L. Aquilia.*[20] I will just quote as an example Paul's remark on the corruption of children.[21] My object in this apparent digression is to remind you that Aristotle had good reason to discuss involuntary transactions as matters of corrective justice or legal redress. In Greek and even in Roman law this point of view of redress of a grievance is chiefly insisted upon. Turning now to Aristotle's own teaching, we find that he employed a characteristic expedient in order to co-ordinate his treatment of corrective with that of distributive and with the wider range of universal justice. As justice seeks the equal and the mean (*τὸ ἴσον καὶ τὸ μέσον*) he makes all relations dependent on it resolve themselves into equations (*ἰσάζεσθαι*).

In distributive justice the equation is formed between the two halves of a geometrical proportion. Advantage stands to advantage in quantity as man stands to man in quality. But the justice of redress has also to be squared into an equation. In this case it arises from an arithmetical proportion, that is, it is produced by subtraction instead of division. The estate of the offender is conceived to be in excess of the mean by as much as the mean is in excess of the estate of the aggrieved person.[22]

Now, this formula together with some reflections on the mission of halving entrusted to the judge (*δικαστής,* from *δίχα*) has given occasion to Prof. Burnet to interpret Aristotle's view of corrective justice in the sense of an adjustment by which the loss of one party has to be added to the gain of the other and the sum has to be cut, as it were, in two.[23] It cannot have

[20] Grüber, Lex Aquilia, 199 ff.

[21] Dig., XI, 3, 14, § 1. De filio filiare familias corruptis huic edicto locus non est, quia servi corrupti constituta actio est, qui in patrimonio nostro esset, et pauperiorem se factum esse dominus probare potest dignitate et fama domus integra manente; sed utilis competit officio judicis æstimanda, quoniam interest nostra, animum liberorum nostrum non corrumpi.

[22] Nic. Eth., V, 4, 8, 1132 a, 27: *ὅταν δὲ δίχα διαιρεθῇ τὸ ὅλον, τότε φασὶν ἔχειν τὸ αὑτοῦ ὅταν λάβωσι τὸ ἴσον. τὸ δ' ἴσον μέσον ἐστὶ τῆς μείζονος καὶ ἐλάττονος κατὰ τὴν ἀριθμητικὴν ἀναλογίαν. διὰ τοῦτο καὶ ὀνομάζεται δίκαιον, ὅτι δίχα ἔστιν, ὥσπερ ἂν εἴ τις εἴποι δίχαιον, καὶ ὁ δικαστὴς διχαστής. ἐπὰν γὰρ δύο ἴσων ἀφαιρεθῇ ἀπὸ θατέρου, πρὸς θάτερον δὲ προστεθῇ, δυσὶ τούτοις ὑπερέχει θάτερον. εἰ γὰρ ἀφῃρέθη μέν, μὴ προσετέθη δὲ, ἐνὶ ἂν μόνον ὑπερεῖχεν. τοῦ μέσου ἄρα ἐνί, καὶ τὸ μέσον, οὗ ἀφῃρέθη, ἐνί.*

[23] The Ethics of Aristotle, edited with an introduction and notes, by John Burnet, 1900. *Vide* notes on V (E) 4, 3, 1132 a, 4; V, 4, 4, 1132 a, 9; V, 4, 10, 1132 a, 32.

been Aristotle's meaning, argues Burnet, to dwell at length on the mere carrying over of the gain (κέρδος) on the side of the loss (ζημία) in order to compensate the material deficiency. This might, perhaps, have served the purpose in the case of voluntary transactions, but not in the case of delicts, in which loss and gain are not strictly commensurate, and the gain comprises, usually, much more than the actual damage incurred, because it represents also the wrongful assumption of authority, the element of criminality, the infringement of public order, etc. Thus we are again puzzled by penal accretions *ex delicto*. Such an interpretation could hardly be accepted in its direct setting. Apart from the vague character of the supposed precept of halving the aggregate of gain and loss, how could this operation be performed in practice, and are there any traces of it in the records of actual Greek legislation? Surely there ought to be, because it is one thing to notice that Aristotle has made use of a false etymology and an entirely different one to suppose that he presented a formula out of keeping with facts. As a matter of practice, the judges did not divide loss and gain by halves, which would have been impossible and unfair, but simply voted for the estimation of wrong and damage which seemed to fit the case best. The notion of halves is suggested by the necessity of re-establishing equality and has to draw its meaning from the latter.

Now the equality from which relations start and to which they have to revert in this case can only apply to a *personal equation*. The estates of plaintiff and defendant which have to be equalized are not the quantities of their fortunes. It would have been strange indeed if the illustration of the process in V, 4, 12, starting from the idea that there is a medium to which the losing and the gaining parties have to be reduced, applied to goods. There is no such medium in point of quantity between private fortunes, and the equality disturbed by the involuntary transaction is distinctly stated to be an equality as between citizens.[24] This view of the relation makes it easier to understand in what sense gain and loss are meant and what the taking away of κέρδος and the making up of the ζημία are intended to effect. The loss, ζημία, comprises evidently all the

[24] Nic. Eth., V, 4, 3, 1132 a, 2: *οὐδὲν γὰρ διαφέρει, εἰ ἐπιεικὴς φαῦλον ἀπεστέρησεν ἢ φαῦλος ἐπιεικῆ, οὐδ' εἰ ἐμοίχευσεν ἐπιεικὴς ἢ φαῦλος. ἀλλὰ πρὸς τοῦ βλάβους τὴν διαφορὰν μόνον βλέπει ὁ νόμος, καὶ χρῆται ὡς ἴσοις, εἰ ὁ μὲν ἀδικεῖ ὁ δ' ἀδικεῖται, καὶ εἰ ἔβλαψεν ὁ δὲ βέβλαπται.*

disadvantages, moral as well as material, to the aggrieved person which follow on the action of the offending party. The pain caused by a blow, the moral shock occasioned by it, the feeling of humiliation, the discredit thrown on the sufferer in the eyes of the public, all these elements have to be estimated in order to form a conception as to the loss sustained. Isocrates' oration against Lochites gives an example of the reckoning up of such moral *imponderabilia*.[25] The well-known occurrence mentioned by Gellius (XX, 1) as the cause of the change of the law as to blows in Rome throws light on the difficulty of treating such cases from the purely penal point of view.[26]

The meaning of the change in the Roman law as to battery evidently was that the rowdy millionaire indulging in the luxury of treating his countrymen like dogs had, as it were, big cheques ready to satisfy their pretensions. Should any one of them have stood on his right and brought an action against him, the penalty would have been the result of an estimation, a τίμησις and not the application of a common fine. One can even well imagine that a clever accuser speaking κατὰ τινος on such an occasion would take his stand on the fact that the compensation ought to be commensurable, not only to the loss of the aggrieved person, but also to the gain of the offender, who evidently derived great satisfaction from the fact that he could set at naught the laws of his country and deal at pleasure with his fellow-citizens without troubling much about the corresponding

[25] Isocrates. ΚΑΤΑ ΛΟΧΙΤΟΥ, 396 c and ff., ed. Blass, II, p. 235: Ἐγὼ δ' εἰ μὲν μηδεμία προσῆν ὕβρις τοῖς πεπραγμένοις, οὐκ ἄν ποτ' εἰσῆλθον εἰς ὑμᾶς. νῦν δ' οὐχ ὑπὲρ τῆς ἄλλης βλάβης τῆς ἐκ τῶν πληγῶν γενομένης ἀλλ' ὑπὲρ τῆς αἰκίας καὶ τῆς ἀτιμίας ἥκω παρ' αὐτοῦ δίκην ληψόμενος, ὑπέρ ὧν προσήκει τοῖς ἐλευθέροις μάλιστ' ὀργίζεσθαι καὶ μεγίστης τυγχάνειν τιμωρίας. ὁρῶ δ' ὑμᾶς, ὅταν του καταγνῶθ' ἱεροσυλίαν ἢ κλοπὴν, οὐ πρὸς τὸ μέγεθος ὧν ἀν λάβωσι τὴν τίμησιν ποιουμένους ἀλλ' ὁμοίως ἁπάντων θάνατον καταγιγνώσκοντας, καὶ νομίζοντας δίκαιον εἶναι τοὺς τοῖς αὐτοῖς ἔργοις ἐπιχειροῦντας ταῖς αὐταῖς ζημίαις κολάζεσθαι. χρὴ τοίνον καὶ περὶ τῶν ὑβριζόντων τὴν αὐτὴν γνώμην ἔχειν, καὶ μὴ τοῦτο σκοπεῖν. εἰ μὴ σφόδρα συνέκοψαν, ἀλλ' εἰ τὸν νόμον παρέβησαν, μηδ' ὑπὲρ τοῦ συντυχόντος, μόνον ἀλλ' ὑπὲρ ἁπαντος τοῦ τρόπου δίκην παρ' αὐτῶν λαμβάνειν, etc.

[26] Gellius, Noctes Atticæ, XX, 1, 13: Lucius Veratius fuit, egregie homo improbus atque immani vecordia. Is pro delectamento habebat, os hominis liberi manus suæ palma verberare. Eum servus sequebatur crumenam plenam assium portitans; ut quemque depalmaverat, numerari statim secundum duodecim tabulas, viginti et quinque asses jubebat. Propeterea, inquit, 'prætores postea hanc abolescere et relinqui censuerunt; injuriisque æstimandis recuperatores se daturos edixerunt.'

Something similar to the L. Veratius anecdote is reported from later Greece.

loss in money. I do not want to make an argument of such a supposition, but it seems appropriate to illustrate the *subjective* coloring of the fines, on one hand, the ultimate equalization of gain and loss, on the other.[27] If we take up our standpoint on the valuation of the ζημία, the grievance or loss, we shall have to treat it as corresponding to the extent of gain which accrued to the offender, although this is not strictly true, but only called forth by the procedure of carrying over a supposed excess to cover a supposed loss. In the same way, should we start from an estimation of gain in the sense of the material and moral advantage derived from the wrong, these considerations will eventually appear as an inverted estimate of a loss to be compensated, although, as a matter of fact, the loss incurred may have been of an entirely different kind. Nor is it impossible to try to draw up a certain balance of claims based on considerations from both sides, and this would perhaps be the nearest approach to a realization of Prof. Burnet's hypothesis. Anyhow, what is not conjectural is the fact that legal redress was treated in Greek law as the result of compensation on the basis of complex estimates, and this fact affords the best justification for Aristotle's teaching on the subject, which seems so unmodern and therefore obscure to us.

The whole procedure is bound to appear even more strange when we take into account the means by which such valuations were carried out in practice. The Roman procedure in such cases was a simple and reasonable one. The magistrate, a *judex* or a couple of *recuperatores,* inquired into the damage done, made an expert valuation of the wrong in all its bearings, and a decision was given accordingly by the Court.[28] If we had only Aristotle's account before us in regard to Greek procedure in such cases, we might have thought that in Greece, too, the judge, the δικαστής, proceeded to estimate the complex elements of the disturbed relation and to formulate the amount of compensation. But there is little in Greek law to support such a view. The nearest approach to an impartial verdict on the strength of expert appreciation is indicated by Plato in his

[27] Nic. Eth., V, 4, 4, 1132 a, 9: Ἀλλὰ πειρᾶται τῇ ζημίᾳ ἰσάζειν, ἀφαιρῶν τοῦ κέρδους.

[28] Mommsen, Römisches Strafrecht, 803, 804.

Laws in the case of disputes as to the infringement of agrarian rights.[29]

As Plato's positions in the Laws are generally based on some actual rules used in Doric or other States, we may suppose that this particular instance also points to practices which may have existed somewhere in the wide region occupied by Greek Commonwealths. But it is impossible to locate these practices definitely. In most cases about which we are accurately informed the τίμησις was effected by a decision based on two alternatives laid down by the parties to the trial. It was so in Athens, about which we know most, but there is evidence of the same kind of procedure in Sparta, in Crete and in Ephesos.[30] All the authorities agree that this mode of estimating compensation was suggested and rendered necessary by the procedure taking place before large bodies of judges in the popular tribunals, two hundred and one or four hundred and one, according to the magnitude of the suit—in the Athenian Heliaia. It is characteristic in this connection that even in Rome when actions for *injuriæ* were carried before the judicial consilium instituted by the *Lex Cornelia injuriarum* the method of alternative estimates was adopted.

The consideration making for fairness in such cases was expressed by Aristotle in a passage of his Politics.[31] When jurors have to make up their mind about matters admitting of shades of opinion it is impossible to leave them free to give vent to all the varieties of possible disagreement. Let them choose between clear alternatives set before them. There is no breach of the oath to select the one which is nearer to your view and to reject the one which swerves further from it.

But why does Aristotle speak of the power of the δικαστής to adjust differences between the contending parties? Have we to take his expressions in a vague way, as applying merely to the settlement effected by a judicial decision, irrespectively of the method by which the decision has been obtained?

[29] Leges, VIII, 844: ἐὰν δὲ ἐκ Διὸς ὕδατα γιγνόμενα, τὸν ἐπάνω γεωργοῦντα ἢ καὶ ὁμότοιχον οἰκοῦντα τῶν ὑπωκάτω βλάπτῃ τις, μὴ διδοὺς ἐκροήν, ἢ τούναντίον ὁ ἐπάνω μεθιεὶς εἰκῇ τὰ ῥεύματα βλάπτῃ τὸν κάτω. καὶ περὶ ταῦτα μὴ ἐθέλωσι διὰ ταῦτα κοινωνεῖν ἀλλήλοις, ἐν ἄστει μὲν ἀστυνόμων, ἐν ἀγρῷ δὲ ἀγρονόμων ἐπάγων ὁ βουλόμενος ταξάσθω, τί χρὴ ποιεῖν ἑκάτερον. ὁ δὲ μὴ εμμένων ἐν τῇ τάξει, φθόνου θ' ἅμα καὶ δυσκόλου, ψυχῆς, ὑπεχέτω δίκην, καὶ ὄφλων διπλάσιον τὸ βλάβος ἀποτινέτω τῷ βλαφθέντι, μὴ ἐθελήσας τοῖς ἄρχουσι πείσθεσθαι. (Bekker's Text.)

[30] Mitteis, Reichsrecht und Volksrecht, 70.

[31] Pol. II, 8, §§ 13-15, p. 1268 b.

Hardly. The passage in the Ethics speaks of the δικαστής in the singular and dwells on his character as a mediator (μεσίδιος) and on the supposed derivation of his very name from a process of cutting into halves (διχάζειν). It seems possible to suppose that in this case Aristotle had only in view the technical juror of the Athenian dicasterion, as is taken for granted by Prof. H. Jackson in his translation of Book V. The singular in the text points to the general office of the judicature in all its kinds and varieties. This being so, I should be inclined to include the action of the διαιτητής. To be sure, Aristotle draws the line sharply in some respects between the δικαστής (judge) and the διαιτητής (arbiter). For this there is good reason, and nobody doubts, of course, that the jurisdiction of arbiters has to be distinguished technically from that of *ex officio* judges. But in a sense the public διαιτηταί of Athens were entrusted with very important functions in regard to the trial of cases turning on private claims. In small trials up to ten drachmæ the forty, the successors of the δικασταὶ κατὰ δήμους, estimated claims and decided on them. In more important controversies the public arbiters (διαιτηταί) had to investigate the matter. Their investigation was a regular and necessary part of the procedure. They were seized of the case by the forty, examined evidence, held views, gave decisions, and it was only on an appeal that the decisions of public arbiters were sent up for revision to the dicasteria.[32] Even at that stage the procedure was restricted to an examination of the evidence produced before the arbiters, of the laws applied by them and of the decision as formulated by them.[33] This means that in cases of damages and personal wrongs the ground for the decision was thoroughly prepared by the preliminary procedure before the arbiters; their valuation must have supplied the frame for the alternative questions to be put to the jurors. A curious illustration of the importance of the inquiry of the arbiter as a preliminary to the action before the dicasteria may be found in Demosthenes' speech for Ariston against Conon.[34] In fact, there is no reason to suppose that Aristotle entirely disregarded the common course of procedure in the case of damages and wrongs

[32] Meier, Schömann and Lipsius, Attischer Process, 986.

[33] Ath. Pol. (ed. Venyon, Berlin, 1903) c. 53.

[34] Demosthenes, Ariston v. Conon, c. 29, p. 1266: ἐπειδή γ' ἀνεστηκὼς ἤδη προσεκαλεσάμην αὐτόν, ἐν τῇ πρώτῃ συνόδῳ πρὸς τῷ διαιτητῇ παραδιδοὺς ἐφαίνετ' ἄν. ὧν οὐδὲν πέπρακται τούτῳ. Cf. cc, 26, 27.

which must have afforded everyday examples of the action of the judge as a mediator.

Altogether, the treatment of legal redress in Book V, although certainly much obscured by the shortness of the account, by puzzling mathematical analogies, by the unsatisfactory state of the text and by the even more unsatisfactory manner in which the lectures of the philosopher were reported, is not at variance with the actual practice of Greek law and affords interesting material for the discussion of a system of legal redress based on the reduction of moral claims to material estimates.

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